(4.)

A

LETTER

TO THE

HON. THOMAS ERSKINE,

WITH

A POSTSCRIPT

TO THE

Right Hon. Lord Kenyon,

UPON THEIR CONDUCT AT THE

TRIAL OF THOMAS WILLIAMS

FOR PUBLISHING

PAINE'S AGE OF REASON.

BY JOHN MARTIN,

SOLICITOR FOR THE DEFENDANT.

Nemo me impune lacessit.

LONDON:

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1797

A LETTER, &c.

I HAVE always considered that life without character is not worth keeping, and therefore I am equally an enemy to the assassin of character as to the assassin of life.

You are well acquainted with the wicked and impotent attempts which have been made to destroy me as an enemy to my country. You know that the most oppressive measures have been adopted against me on the mere suggestions of counsel, without instructions or affidavit to support it; and you know, that you yourself have formerly attacked me unjustly, and that I have been greatly oppressed and injured by such attacks.

Not being in the habit of speaking publicly, I have not, upon any of those occasions, offered to answer

the inſinuations thrown out againſt me by counſel, but I did not therefore acquieſce in the juſtice of them, and for the ſake of my character (without which I have been taught to conſider life not to be of value) I have endeavoured, and I hope ſucceſsfully, to vindicate myſelf from the falſe inſinuations thrown out againſt me.

You have, however, proceeded a ſtep farther, for you in plain terms have held me out to be an enemy not only to the civil liberty but to the religious eſtabliſhment of my country. To them both. For you declare that, in my conduct of the defence of Thomas Williams, "the foundation of all our laws, and the "ſanctions of all our juſtice are to be ſtruck at and "inſulted;" and that, for having put my name to a notice to the proſecutors of the indictment "*to pro-*"*duce the Bible*," I ought to be ſtruck off the Roll of Attornies.

You know by this time, and, indeed, before the trial was ended, both yourſelf and Lord Kenyon were appriſed of the propriety of the *notice*, for neither did you mention it again in your reply, nor did his lordſhip notice it in his charge to the jury; but as I find all you ſaid on that occaſion repeated in the report of your

ſpeech,

ſpeech, publiſhed under your own correction, I think it neceſſary thus publicly to vindicate my own character from your falſe and malicious aſperſions. I am alſo impelled to the conſideration of your conduct by another motive. When we obſerve ambitious men endeavouring to raiſe themſelves by eſpouſing the popular againſt the ariſtocratical ſide, it is our duty to watch the conduct of ſuch men, and to point out every thing which may appear to be a dereliction of thoſe principles which they profeſſed, that they may have an opportunity of explaining their own conduct, and the public of judging how far their conduct is conſiſtent with their profeſſions, and how far they are fit men to be intruſted with thoſe powers for which they are candidates.

The defendant, Thomas Williams, was indicted for that he "being a wicked impious and ill-diſpoſed "perſon and having no regard for the laws and reli- "gion of this realm, but moſt wickedly, blaſphe- "mouſly, impiouſly and profanely deviſing and in- "tending to aſperſe, vilify and ridicule that part of the "Holy Bible which is called the Old Teſtament and "the Chriſtian Religion on the 1ſt day of January in

" the year of our Lord 1796 with force and arms at " Weſtminſter in the county of Middleſex did publiſh " and cauſe to be publiſhed a certain wicked, falſe, im- " pious and blaſphemous libel containing therein " amongſt other things as follows, that is to ſay, (*p.* 10) " Whenever we read the obſcene ſtories, the voluptuous " debaucheries, the cruel and torturous executions, the " unrelenting vindictiveneſs, with which more than " half the Bible is filled, it would be more conſiſtent " that we called it the word of a Demon than the word " of God. It is a hiſtory of wickedneſs that has " ſerved to corrupt and brutalize mankind.

Page 13. " Did the book called the Bible excel in " purity of ideas and expreſſion all the books that are " now extant in the world, I would not take it for my " rule of faith as being the word of God, becauſe the " poſſibility would nevertheleſs exiſt of my being im- " poſed upon. But when I ſee throughout the greateſt " part of this book ſcarcely anything but a hiſtory of " the groſſeſt vices, and a collection of the moſt paltry " and contemptible tales, I cannot diſhonor my Creator " by calling it by his name.

Page 44. " To charge the commiſſion of things " upon the Almighty which in their own nature and " by every rule of moral juſtice are crimes as all " aſſaſſination is, and more eſpecially the aſſaſſination " of infants is matter of ſerious concern. The Bible " tells us that thoſe aſſaſſinations were done by the " expreſs command of God. To believe therefore " the Bible to be true we muſt unbelieve all our belief " in the moral juſtice of God, for wherein could cry- " ing or ſmiling infants offend? and to read the Bible " without horror we muſt undo every thing that is " tender, ſympathiſing and benevolent in the heart of " man. Speaking for myſelf, if I had no other evi- " dence that the Bible was fabulous than the ſacrifice I " muſt make to believe it to be true, that alone would " be ſufficient to determine my choice.

Page 91. " I have now gone through the exami- " nation of the four books aſcribed to *Matthew*, *Mark*, " *Luke*, and *John*, and when it is conſidered that the " whole ſpace of time from the Criciſixion to what is " called the Aſcenſion is but a few days (apparently " not more than three or four) and that circumſtances " are reported to have happened nearly about the ſame

" ſpot, Jeruſalem, it is, I believe, impoſſible to find in " any ſtory upon record ſo many, and ſuch glaring ab- " ſurdities, contradictions, and falſhoods as are in thoſe " books."

There were other counts in the indictment, but as they were given up on the trial it is not neceſſary to take notice of them. Theſe paſſages were charged to be *in contempt of the Holy Bible and of the Chriſtian Religion*, and it will readily be perceived that it was an eſſential part of my duty to have the Bible in the court at the trial, and that the defence to be made on this trial could only be made out of the Bible; for if every allegation made by the author reſpecting the Bible be in fact true, the defendant would thereby get rid, at leaſt, of that part of the charge againſt him which imputed to him the publication of a *falſe* libel, and it would then remain with the Jury to conſider whether *Truth* could be called *wickedneſs*, *blaſphemy*, *impiety* and *profaneneſs*.

It is evident that the defendant could not eſtabliſh this point without the production of the Bible, and examining the kings, prieſts and prophets of the Jews and the evangeliſts of the Chriſtians, who were charged by

by the author with having committed the crimes and the abſurdities, contradictions and falſhoods imputed by the author to them. It was not my intention to deny the Bible, but to admit it to the full extent which the proſecutors could wiſh for, and the *notice* which I gave to the proſecutors to produce the Bible, was merely for the purpoſe of avoiding a critical objection which might have been made to any Bible which I could produce, for I expected to hear you object againſt the Bible produced by the counſel for the defendant, that it ſhould not be received as evidence until the authenticity of it was proved, and as it might not be quite convenient for me to produce the legal evidence which would be neceſſary to obviate your objection in a court of law, I therefore took that method which is every day taken by giving the following *notice* to the proſecutors, who are Biſhops, to produce what they could not ſay it was not in their power to produce, viz. ſuch a Bible as they would admit to be genuine, and ſuch as was by them referred to in their indictment:

In the King's Bench.

The King *v.* Thomas Williams for Blaſphemy.

Take Notice that the Proſecutors of the Indictment againſt the above named Defendant will upon the Trial of this Cauſe be required to produce a certain Book deſcribed in the ſaid Indictment to be the Holy Bible.

Dated the 17th Day of June 1797.

JOHN MARTIN,
Solicitor for the Defendant.

To Meſſ. Grave and Vines,
Agents for the Proſecutors.

This *notice*, however, was taken hold of by you as an offence of the greateſt atrocity. You ſay, " If I " were to anticipate the defence which I hear and read " of, it would be defaming by anticipation the learned " counſel who is to make it; for if I am to collect it " even from a formal notice given to the proſecutors " in the courſe of the proceedings, I have to expect " that, inſtead of a defence conducted according to " the rules and principles of Engliſh law and juſtice, " that the foundation of all our laws and the ſanctions " of all our juſtice are to be inſulted. What is the " force of that juriſdiction which enables the court to

" ſit

" ſit in judgment? What but the oath which his
" lordſhip as well as yourſelves have ſworn upon the
" Goſpel to fulfil? Yet in the King's Court, where his
" Majeſty is himſelf ſworn to adminiſter the juſtice of
" England—in the King's Court—who receives his
" high authority under a ſolemn oath to maintain the
" chriſtian religion as it is promulgated by God in
" the Holy Scriptures, I am nevertheleſs called upon
" as counſel for the proſecution to produce *a certain*
" *Book deſcribed in the indictment to be the Holy Bible.*
" No man deſerves to be upon the Rolls of the Court
" who dares as an Attorney to put his name to ſuch a
" notice. It is an inſult to the authority and dignity
" of the court of which he is an officer, ſince *it ſeems*
" to call in queſtion the very foundations of its juriſ-
" diction. If this is the ſpirit and temper of the de-
" fence—if, as I collect from that array of books which
" are ſpread upon the benches behind me, this publica-
" tion is to be vindicated by an attack on all the truths
" which the chriſtian religion promulgates to mankind
" let it be remembered that ſuch an argument was
" neither ſuggeſted nor juſtified by any thing ſaid by
" me on the part of the proſecution."

Your

Your real meaning in all this declamation will not readily be perceived. I may gueſs at the cauſe of it, but as it is not my wiſh to aſcribe a motive which you have not avowed, I ſhall not venture to give any conjecture as to it, but, taking it according to the plain ſenſe of the paſſage, I aſk, in what reſpect is the *notice* improper? Is there any thing more common than for one party to give notice to the other to produce books and papers on which the party giving ſuch notice intends to rely at the trial? Is there anything improper or indecent in the production, or in giving a *notice* to produce "in the King's Court," where his Majeſty himſelf is ſuppoſed to preſide, that book which is, "the foundation of our religion, and the baſis of our "juriſprudence?" I may aſk, alſo, how it could poſſibly enter into your mind that a defence founded upon the Bible ſhould "inſult the foundation of all our laws "and the ſanction of all our juſtice?" And that the Goſpels themſelves ſhould, by being read in a court of judicature upon a ſolemn trial, "deſtroy the force of "that juriſdiction which enables the court to ſit in "judgment, or unhinge the ſecurity afforded of that "oath which the judge and jury have ſworn upon the "Goſpel to fulfill?" On the contrary, what are we to

think

think of the man who in a court of judicature ſhould reject the Bible as evidence of the facts therein contained; who ſhould in plain terms ſay that it is an improper and indecent book to be read in public? And I leave it to every impartial man to judge whether I deſerve to be ſtruck off the Roll of Attornies for having given that notice, or you deſerve to have the gown ſtripped from your back for having contended that the Bible itſelf is a book which ought not to be produced or given in evidence in the court of King's Bench. Whether have *you* or *I* moſt inſulted the authority and dignity of the court, or "*ſeemed* to call in "queſtion the very foundation of its juriſdiction?" And as to your anticipation of what the defence was to be, I may aſk, Where did you "hear and read of it?" and how could you "collect that it was to be an attack on all the truths which the Chriſtian Religion "promulgates to mankind" merely "from the array "of books which were ſpread on the benches behind "you" when you will not dare to ſay that you knew the title of any one of theſe books *?

* Mr. Kyd in his addreſs to the jury upon the *firſt* count of the indictment, ſays, "I aſk you as fair and impartial men "whether you have not read in that book, ſtories which, if "found

Your opening ſpeech being cloſed, and the publication proved by Mr. Fleming, you next proceeded to examine Mr. Smith, the Solicitor for the proſecution, who proved that he had been ſerved with the *notice*,

" found in any *other* book, you would juſtly have denominated " obſcene; deſcriptions which, if found in any *other* book " might fairly be termed deſcriptions of voluptuous debau- " cheries; relations of tranſactions deſcribed as having taken " place under the immediate direction of the Deity, which, " if you had found them in any *other* book, you would have " called by the name of cruel and torturous executions, and " conſidered as examples of unrelenting vindictiveneſs.

" I did intend to read to you, from the Bible, ſeveral " paſſages which might be ranked under the claſs of obſcene " ſtories and voluptuous debaucheries, but I now feel it my " duty to ſpare the modeſt ears of an Engliſh audience, and " not to read them."

After citing the paſſages, he proceeds, " With reſpect to " the inſtances of cruel and torturous executions and unre- " lenting vindictiveneſs, I do not feel myſelf reſtrained by " any principle of modeſty from reading *them*, and therefore " I will give them to you at full length. The firſt to which " I ſhall crave your attention is that of the treacherous and " cruel revenge of the two ſons of Jacob, Simeon and Levi, " on the Sichemites, Gen. 34.

Lord Kenyon. " I do not know how far I ought to ſit here " and ſuffer a Gentleman at the bar to bring forward parts " of the Bible in this way. You may *cite* the paſſages."

Mr. Kyd. " Then, my Lord, I will cite them."

but

but leſt that evidence ſhould not be ſufficient to bring the notice home to me, Lord Kenyon, with the laudable view, no doubt, of aſſiſting you in your application to ſtrike me off the roll, put the queſtion to myſelf, Whether or not I avowed having ſent this notice? I might have anſwered his Lordſhip by repeating the maxim of the law of England, that *a man is not bound to accuſe himſelf*, but I was willing to give full ſcope to your malevolence, and in your own report of the caſe it is confeſſed that "I readily admitted that I had ſent "the *notice* to thoſe who are concerned for the proſe- "cution." I ſhall only farther obſerve upon this point, that you was ſoon convinced that the defence was not of that nature which you had prophecied; and ſo ſenſible was you, as well as Lord Kenyon, as to the propriety of the *notice*, that neither yourſelf in your reply, nor his Lordſhip in his Charge to the Jury took any farther notice of it. You have allowed the laſt term to elapſe without making any motion to the court to ſtrike me off the roll, and I think it neceſſary to inform you, that I ſhall not, in future, tamely ſubmit to be held up with contempt or ridicule by any man who, becauſe he is decorated with ſilk and horſe-hair, takes it into his head ſo to do. As an officer of the

court I am entitled to the protection of the court, and I hope I have reſolution enough to inſiſt upon that protection. Your own mind may ſuggeſt to you what you ought to do, and unleſs you do that which ought to be done when the defendant ſhall be brought for judgment in the next term, you may expect that I ſhall endeavour to do juſtice to myſelf.

Let us now conſider your conduct upon this trial as a public proſecutor. It is not my intention to enter into a minute diſcuſſion of your ſpeech, which, upon the whole, was more like the frantic ravings of a Field-Preacher than the ſober argument of an advocate in a court of juſtice. I cannot, however, help making a few obſervations, which, unleſs you can explain away, may be a warning to the public againſt the conſequence of putting their truſt in a man who is to be found conſtantly accuſing others of that, as criminal, which he himſelf makes no ſcruple to commit. We have heard you daily in the character of advocate for perſons accuſed on account of their political opinions, declaiming with apparent enthuſiaſm againſt the conduct of State Proſecutors. We are now to view you in the character of advocate for a ſociety of Eccleſi-

aſtics,

aſtics, combined for the purpoſe of proſecution; and we ſhall find, perhaps, the ſame rigour of proſecution, the ſame rancour of expreſſion, and a greater dereliction of principle, in the preſent caſe, than is to be met with in any proceeding recorded in the hiſtory of the law.

In your introductory addreſs to the jury you began by informing them that "it had fallen much oftener to "your lot to defend indictments for libels than to aſſiſt "in the proſecution of them. But (ſay you) I feel no "embarraſſment from that recollection ſince *I ſhall not* "*be found to-day to expreſs a ſentiment or to utter an ex-* "*preſſion inconſiſtent with thoſe invaluable principles for* "*which I have uniformly contended in the defence of others.* "*Nothing that I have ever ſaid, profeſſionally or perſonally* "*for the Liberty of the Preſs, do I mean to-day to contra-* "*dict or counteract.*"

I was happy to hear you expreſs yourſelf in this way becauſe I was certain that, if you kept your word, you yourſelf muſt not only aſſent to the acquittal of the defendant, but require the Jury to acquit him upon this indictment. But though you thought it neceſſary to

make this declaration; yet, having made it, you did not think it neceſſary to abide by it in fact; but, in conducting this proſecution, you acted as other proſecutors have done before you, whoſe conduct you have uniformly reprobated; and, notwithſtanding the enactment of the Stat. of 32 Geo. III. c. 60 for which you are conſtantly trumpeting your own fame and the fame of your political leader, Mr. Fox, yet we find you acting in direct contradiction to the terms of that act. By that ſtatute, which has well been called the *Libel* Act (for a groſs libel it is againſt the laws of England) it is enacted "that on every trial for libel the jury may "give a general verdict of Guilty or Not Guilty upon "*the whole matter put in iſſue* upon the indictment; *and* "*ſhall not be required or directed* by the Judge before "whom ſuch indictment ſhall be tried to find the de-"fendant guilty *merely on the proof of the publication* by the defendant of the paper charged to be a libel *and of* "*the ſenſe aſcribed to the ſame* in ſuch indictment." What, then, was the iſſue to be tried in this cauſe? The indictment charges that "Thomas Williams "being a wicked, impious, and ill-diſpoſed perſon "and having no regard for the laws and religion of this

" this realm, but moſt wickedly, blaſphemouſly, im-
" piouſly and profanely deviſing and intending to aſ-
" perſe, vilify and ridicule the Bible and the Chriſtian
" Religion, he did publiſh a certain wicked, falſe, im-
" pious and blaſphemous libel," &c. To this charge he had pleaded that he was not guilty; and the whole iſſue to be tried was, not only whether he did *publiſh* the book, but alſo, whether it was a *falſe* libel, and whether he was *guilty* of having publiſhed it with the wicked, blaſphemous, impious and profane device and intent imputed to him in the indictment, (to wit) " to aſperſe
" vilify and ridicule the Bible and the Chriſtian Reli-
" gion;" but, having proved the publication, you ſtopped ſhort; and, without any evidence of the criminal intention, diſregarding the terms of your favourite act of parliament, you, like other proſecutors, put this proof of publication to the jury as evidence alſo of the criminal charge contained in the indictment, and *you required*, and the learned judge *directed* the jury to find the defendant guilty, merely on the proof of publication.

Let us contraſt this with your conduct in other caſes. I dare ſay you have not forgotten the ſtand which you

made in the caſe of the Dean of St. Aſaph, againſt the precedent of finding men guilty of the whole charge upon proof of the publication alone; a precedent which you branded as being raked out of the aſhes of the Star Chamber, "eſtabliſhed when the courts at "Weſtminſter Hall were filled with Judges equally the "tools of power as thoſe in the Star Chamber, and "maintained from the arbitrary proceedings of abject "unprincipled and dependent judges, raiſed to their "ſituation, without abilities or worth, in proportion "to their ſervility to power." Nor can you have forgotten that it was for the avowed purpoſe of deſtroying this precedent, which was tenaciouſly adhered to by the "*free, honourable, independent* and *ſagacious*" judges of the preſent day, that your Libel Bill was introduced and paſſed. But in all the preſent tranſaction, Where is your high toned language? Where do you aſſert, or offer to prove the charge of the criminal intention of the defendant, not as "words "of form, but of the very eſſence of the charge*." Where

* "*Gentlemen*, The Dean of St. Aſaph is indicted by the "profecutor, not for having publiſhed this little book; that "is not the charge: but he is indicted of publiſhing a falſe, "ſcandalous

Where is your boaſted act to remove doubts reſpecting the functions of juries? Did ever an Attorney general

" ſcandalous and malicious libel; and of publiſhing it (I am
" now going to read the very words of the charge) ' with a
' malicious deſign and intention to diffuſe, among the ſubjects
' of this realm, jealouſies and ſuſpicions of the king and his
' government; to create diſaffection to his perſon; to raiſe
' ſeditions and tumults within the kingdom; and to excite
' his majeſty's ſubjects to attempt, by armed rebellion and
' violence, to ſubvert the ſtate and conſtitution of the nation.'

" Theſe are not words of form, but of the very eſſence of
" the charge. The defendant pleads that he is not guilty,
" and puts himſelf upon you, his country; and it is fit, there-
" fore, that you ſhould be diſtinctly informed of the effect of
" a general verdict of Guilty, on ſuch an iſſue, before you
" venture to pronounce it. By ſuch a verdict you do not
" merely find that the defendant publiſhed the paper in
" queſtion: for, if that were the whole ſcope of ſuch a
" finding, involving no examination into the merits of the
" thing publiſhed, the term Guilty might be wholly inappli-
" cable and unjuſt, becauſe the publication of that which is
" not criminal cannot be a crime, and becauſe a man cannot
" be guilty of publiſhing that which contains in it nothing of
" guilt, nothing which conſtitutes guilt. This obſervation is
" confirmed by the language of the record; for if the ver-
" dict of Guilty involved no other conſideration than the
" ſimple fact of publication, the legal term would be, that
" the defendant publiſhed, not, that he was guilty of publiſh-
" ing; yet, thoſe who tell you that a general verdict of Guilty

general to the King, in the worſt of times, require more than that the jury ſhould find the defendant guilty on

" compreheends no more than the fact of publiſhing, are " forced, in the ſame moment, to confeſs, that if you found " that fact alone, without applying to it the epithet Guilty, " *no judgment or puniſhment could follow from your verdict;* " and they, therefore, call upon you to pronounce that guilt " which they forbid you to examine into, acknowledging, " at the ſame time, that it can be legally pronounced by none " but you: a poſition ſhocking to conſcience and inſulting to " common ſenſe.

" Indeed every part of the record expoſes the abſurdity " of a verdict of Guilty which is not founded on a previous " judgment that the matter indicted is a libel, and that the " defendant publiſhed it with a *criminal* intention; for if you " pronounce the word Guilty without meaning to find ſedi- " tion in the thing publiſhed, or in the mind of the publiſher, " you expoſe to ſhame and puniſhment that innocence which " you mean to protect, ſince, the inſtant you ſay the defendant " is guilty, the gentleman who ſits under my Lord is bound " to record him Guilty in manner and form as he is accuſed; " i. e. guilty of publiſhing a ſeditious libel with a ſeditious " intention. And the court above is likewiſe bound to put " the ſame conſtruction upon your finding. And thus, " without enquiring into the only circumſtance that can con- " ſtitute guilt, and, without meaning to find the defendant " guilty, you may be ſeduced into a judgment which your " conſcience may revolt at, and your ſpeech to the world " deny; but which the authors of this ſyſtem have reſolved

" that

on proof of the publication only? And did ever the moſt abject, unprincipled, ignorant and dependent judge

" that you cannot explain to the court that is to puniſh the " defendant, on the authority of your intended verdict of " acquittal.

" As a proof that that is the plain and ſimple ſtate of the " queſtion, I might venture to aſk the learned judge what " anſwer I ſhould receive from the court of King's Bench if " you were this day to find the Dean of St. Aſaph guilty, " but without meaning to find it a libel, or that he publiſhed " it with a wicked and ſeditious purpoſe; and I, on the " foundation of your wiſhes and opinions, ſhould addreſs " myſelf thus to the court when he was called up for judg- " ment:

" My Lords, I hope that, in mitigation of my client's " puniſhment, you will conſider that he publiſhed it with " perfect innocency, believing, on the higheſt authorities, " that every thing contained in it was agreeable to the laws " and conſtitution of his country; and that your lordſhips " will further recollect, that the jury, at the trial, gave no " contrary opinion, finding only the fact of publication."

" Gentlemen, if the patience and forbearance of the " judges permitted me to get to the concluſion of ſuch an " abſurd ſpeech, I ſhould hear this ſort of language from the " court, in anſwer to it: " We are ſurpriſed, Mr. Erſkine, at " every thing we have heard from you. You ought to know " your profeſſion better, after ſeven years practice of it, than " to hold out ſuch language to the court—you are eſtopped " by the verdict of Guilty from ſaying he did not publiſh

" with

judge do more than direct the jury to convict him on such evidence.

If, before the passing of your Libel Act, it really was a doubtful point of law "whether, on the trial of "an indictment for making or publishing any libel, it "was competent to the jury to give their verdict upon "the whole matter in issue," it follows that every Attorney general and every Judge, who entertained such doubt, or rather, who held the question of *Libel or not?* to be matter of law, and not within the cognizance of the jury, were justifiable in entertaining such

"with a seditious intention; and we cannot listen to the de-
"clarations of jurors in contradiction to their recorded judg-
"ment.'

"Such would be the reception of such a defence; and,
"thus you are asked to deliver over the Dean of Saint Asaph
"into the hands of the judges of a court, humane and liberal
"indeed, but who could not betray their oaths, because you
"had set them the example by betraying your's; and would
"therefore, be bound to believe him criminal because you
"had said so on the record, though in violation of your ge-
"nuine opinions—opinions which, as ministers of the law,
"they could neither act upon, nor even advert to their ex-
"istence."

Vide Mr. Erskine's Address to the Jury upon the Trial of the Dean of St. Asaph, p. 23.

doubt.

doubt. And that if, before the ſtatute, they had done wrong, yet, ſtill, they are juſtified, inasmuch as it is by the ſtatute declared to have been a matter of doubt, But the caſe is different ſubſequent to the act. The doubt is reduced to a certainty; and the proſecutor or the judge, who affects ſtill to entertain it, acts criminally againſt the law. And, if it is any aggravation, that the man who tramples upon the law is the author of that law, we may then pronounce your conduct in the preſent caſe, to be more criminal than the conduct of any proſecutor for the crown who ever preceded you. For if ever there was a ſpecies of libel which requires proof of the criminal intention, as well as of the publication to maintain the indictment, it is the blaſphemous libel, for the crime of blaſphemy being defined to be an indignity offered to God, ſuch crime cannot be inferred merely from the act of a bookſeller ſelling a book, in the way of his trade, without having aſſented to or expreſſed his approbation of the doctrines therein contained " Nemo eſt reus niſi mens ſit rea." There is nothing in the caſe, as it was proved on the trial, farther than the manual operation of delivering a book and receiving a ſhilling for it; for no criminal

inten-

intention, and no blaſphemous expreſſion were proved, the evidence having been confined merely to the fact of publication; and though, before the ſtatute, this evidence was deemed ſufficient, yet, ſuppoſing, but not admitting, that *the law* ſupported the deciſions, I contend that, ſince that ſtatute, the proſecutor of an indictment for libel, in order to convict the defendant, muſt prove a criminal intention, as well as the fact of publication; for, were it otherwiſe, we may aſk, What is the meaning of the words of the ſtatute "required or directed?" If there is to be any meaning annexed to them, it muſt be, that neither ſhall the counſel for the proſecution require the jury, nor ſhall the judge direct the jury, to find the defendant guilty on the evidence alone of the publication, and of the inuendos. What is the conſequence? Either that the proſecutor muſt prove ſomething more, or that the defendant muſt be acquitted. And what elſe is left to be proved? The criminal intention, without which there can be no crime; for even the life of a man may be taken away without crime; and it is the malice aforethought, or the criminal intention, which conſtitutes the murder

and

and which muſt be proved againſt the priſoner to convict him of the crime.

In the caſe of Blaſphemy, ſuppoſing it to be a temporal offence, and not an eccleſiaſtical offence at the common law, a poſitive declaration of the blaſphemous expreſſion, as an act of the mind, from the nature of the caſe, muſt abſolutely be proved, and if the party accuſed be not the author of the blaſphemous writing, he muſt be *particeps criminis*, not by publiſhing it merely as a bookſeller, but by publiſhing it as a book of tenets to which he himſelf aſſents. Blaſphemy muſt be openly and directly expreſſed; it cannot be inferred from inuendos, or the mere act of ſelling it as a book of controverſy, as the Age of Reaſon was then underſtood to be; after it had been in the hands of the public more than two years, and had been publicly advertized in all the newſpapers, and ſold by every bookſeller in the kingdom.

I mention this as one inſtance of your inſincerity in your declaration that, "acting for the proſecution, "your conduct would be conſiſtent with the defences "you had formerly made." Indeed, the whole of

your conduct was a moſt flagrant deviation from it; but I ſhall only mention another inſtance of your having "expreſſed ſentiments and uttered expreſſions inconſiſtent with your former ſentiments and expreſſions."

You will, I doubt not, recollect, alſo, the trial of Thomas Paine, for whom you was counſel, and I requeſt that you will read your own ſpeech to the jury on that occaſion, and apply it to your conduct upon this occaſion. I ſhall ſelect only one paſſage becauſe I do not wiſh to ſwell this letter. "*It is common ſenſe* (you ſay p. 75) and the *common adminiſtration of juſtice* ſhews you, if you read any thing or letter to make againſt me, *you muſt read the whole together*, and judge of the object by *all* that he has written—(that, I ſee I have the aſſent of his lordſhip to)—and *you muſt take it out of court*—you are to look *at the whole book*, and *compare thoſe parts with the context and concluſion.*"

But what was the conſiſtency of your conduct in this caſe, and what was the conſiſtency of the learned judge who aſſented to your propoſition? You will recollect that when Mr. Kyd propoſed to read the paſſages of the

the Bible, alluded to by Thomas Paine to juſtify his opinions, he was ſtopped by his lordſhip and the jury and he was told that it would be ſufficient to name the paſſages, and that the jury would take out the Bible and the pamphlet in order to examine the paſſages, previously to forming the verdict. The counſel ſubmitted. The texts were cited, but they were not read, in the expectation that the jury would read that pamphlet upon which, on their ſolemn oaths, they were to pronounce their judgment, not only of the book itſelf, but a judgment which might eventually affect the character, liberty and the property of the defendant. In ſuch expectation the counſel alſo declined reading the different paſſages of the pamphlet from which he contended the intention of the author appeared, and which, when compared with thoſe ſelected in the indictment, would clearly purge them of criminality. The jury, however, did not retire, and neither did they examine the texts of the Bible, nor the contexts of the pamphlet.

Did you, on this occaſion, preſs to the jury "the "*common ſenſe*" and "the *neceſſity* of reading the *whole* "of the evidence, and of *comparing the paſſages* ſelected "with the *context and concluſion?*"—No—Your conduct

was quite the reverſe, and, notwithſtanding all your patriotiſm and zeal for the Liberty of the Preſs, and for the Rights of the People, you aſſented to the monſtrous propoſition, that it was not neceſſary to read any part of the book but the paſſages ſelected in the indictment; and that even the Bible itſelf was ſo unfit to be read in a venerable court of juſtice, upon a ſolemn trial, that you gave up ſeveral counts of the indictment to prevent it from being read; it is, therefore, to be hoped that, when you ſend the ſecond edition of your ſpeech to the newſpapers for publication, you will omit that paſſage of it in which you ſay, that "you ſhould "not be found to expreſs a ſentiment or to utter an "expreſſion inconſiſtent with thoſe principles for "which you had uniformly contended in the defence "of others."

But, leaving it to yourſelf to reconcile your own inconſiſtencies, let us, for a moment, conſider the caſe as it is applicable to the defendant. The jury, as I have already obſerved, did not retire, and neither did they examine the texts of the Bible nor the contexts of the pamphlet; you, however, very conſiſtently, took the verdict, and the learned judge, with equal conſiſtency,

recorded

recorded *it*; but if the jury were bound to take the pamphlet out of the court and to examine *the whole* of it—if this *muſt* be done—I aſk, What is the conſequence of its not having been done? And I leave the queſtion to be anſwered by you and the court, without anticipating, what that anſwer may be. And I aſk if the jury did, in the terms of their oaths, *well* and *truly try* the iſſue joined between the parties, and if their verdict is a true verdict*.

I ſhall ſuppoſe a caſe, that witneſſes abſent have been examined upon interrogatories, and that, when

* "This was the doctrine laid down by Mr. Kyd in examining the *ſecond* count of the indictment. He ſays, "Gentlemen, This paſſage does not ſtand alone and unconnected "with the context; it is connected in ſenſe with two paragraphs preceding it, and, of the three, is the laſt link in a "regular chain of obſervation, It is an admitted maxim in "proſecutions of this kind, that a ſingle offenſive paſſage is "not to be ſelected and conſidered as concluſive evidence "againſt the defendant, but it muſt be compared with the "context, or thoſe other parts of the work to which it ſeems "to bear a relation, and *from the whole taken together your "judgment is to be formed.*"

The rule was admitted to be juſt, but, like a great many other admitted rules, it was not practiſed.

their depoſitions were about to be read upon the trial, one of the parties conceiving that there may be ſome indelicate or offenſive matter in theſe depoſitions, a propoſition is made, that the jury ſhall take the depoſitions out, and read them in private, What would a judge anſwer to that propoſition? I am convinced that he would tell the jury, that he could not aſſent to their taking out thoſe depoſitions unleſs they were firſt read in court; for that it is neceſſary he ſhould know, as well as the jury, upon what evidence the verdict was given. But if the judge ſhould even aſſent, and, notwithſtanding this agreement, the jury ſhould pronounce their verdict without going out of the court, or without reading the depoſitions, I would then aſk, If the court would heſitate a moment in ſetting aſide a verdict thus pronounced? In this caſe, the kings, the prieſts and prophets of the Jews, and the evangeliſts and the apoſtles of the Chriſtians were the witneſſes for the defendant; their depoſitions were the Old and New Teſtaments; the witneſſes were called by the defendant's counſel; the material part of the depoſitious were cited; the jury promiſed to read them, but they pronounced their verdict without going out of the court, and without reading, or ever looking at them. They were bound, alſo, to read the

whole

whole of the pamphlet, for the whole of it was given in evidence; and they ought not to have given their verdict upon the paſſages ſelected in the indictment only; for if this rule of reading the paſſages ſelected in the indictment only ſhall be once admitted, there is not a book extant, not even the Bible itſelf upon which by the aſſiſtance of an *inuendo*, or even without it, a man may not be found guilty of blaſphemy. The well known paſſage, "The fool hath ſaid in his heart there "is no God," might, in the hands of theſe proſecutors be made the baſis of an indictment againſt every man who has a Bible in his poſſeſſion; for it is only leaving out the firſt ſeven words of the ſentence, and charging him, in the terms of this indictment, with having publiſhed a certain wicked, falſe, impious and blaſphemous libel, containing therein (amongſt other things) as follows, (that is to ſay) "there is no God." The counſel for the defendant might contend, that, upon reading the context, the criminality of the charge would inſtantly vaniſh, and, if the jury ſhould either refuſe to examine the context in the court, or ſhould promiſe to take out the Bible and read it themſelves, and not do ſo, but pronounce their verdict upon the indictment alone,

and

and evidence of the publication of the Bible, there is not a moſt Reverend, a right Reverend, or a reverend Clergyman of the Church of England who, by ſuch a trial, might not be convicted.

Such, alſo, was your impatience to get the verdict, that though ſeveral of the counts of the indictment were given up by yourſelf and not read, yet you prayed for a verdict upon *the whole* of the indictment, and ſuch general verdict was given by the jury, and it was received and recorded by the judge.

I hope the next time we meet upon this cauſe you will be in a better humour. In moving for judgment againſt the defendant an important duty will be impoſed on you, which, I do aſſure you, will require all the temper and judgment you poſſeſs; and, if you will take the advice of a man who truly reſpects you, you will lay aſide all that illiberal language and perſonal inſinuations which diſgrace the Engliſh Bar, againſt men who are not expected to anſwer you, whoſe minds you may irritate, and whoſe paſſions may ſome day or other produce diſagreeable effects.

J. MARTIN.

POSTSCRIPT TO LORD KENYON.

I have often heard it doubted, if, upon the trial of a cauſe, a judge has a right to direct the jury at all, and it has been ſaid, that he ſits on the bench merely to record the verdict of the jury. This, however, will be admitted, that the judge has no right to interfere with the defence of the party, to dictate, to check or ſuppreſs it, and I dare ſay your lordſhip will admit that, on this occaſion; you endeavoured to controul the counſel for the defendant in rather an unbecoming manner. You interrupted him twice. On the firſt interruption he was compelled to declare that your interruption "threw "him into ſome embarraſſment as to the mode of proceeding "in the defence." This ought not to have been done. But that was not the worſt of it. He gave up that part of the defence altogether, and contented himſelf with *citing* the paſſages, as your lordſhip requeſted, inſtead of *reading* them, as he had determined to do.

Emboldened with your ſucceſs, your lordſhip interrupted the counſel a ſecond time. In the middle of a very intereſting part of his addreſs to the jury you exclaimed, "I cannot "ſit in this place and hear this kind of diſcuſſion."—*I cannot ſit!!!*—But by that time Mr. Kyd had got beyond the firſt ſtage; he had got over the embarraſſment; and he felt his ground. Your Lordſhip received an anſwer with which I was delighted, "My Lord, I ſtand here on the privi-"lege of an advocate in an Engliſh court of juſtice: this

"man

" man has applied to me to defend him; I have undertaken
" his defence; and I have often heard your Lordſhip declare
" that every man had a right to be defended; I know no
' other mode by which I can ſeriouſly defend him againſt
" this charge, than that which I am now purſuing; if your
" Lordſhip wiſh to prevent me from purſuing it, you may as
" well tell me to abandon my duty to my client at once."

I hope that on every ſimilar occaſion you will receive a ſimilar anſwer.—You felt the force of it—Your choler fell, and you replied " Go on Sir."

I have always received, with ſatisfaction, ſuch advices as your Lordſhip has been pleaſed to favour me with, and I doubt not that your Lordſhip would gladly receive advice from any man—*Fas eſt ab hoſte doceri.* The advice which I humbly tender to your Lordſhip is, to allow every indulgence to a perſon accuſed; and, when the defendant ſhall be brought up for judgment, rather to prevent the interruption of others than to be active in giving interruption yourſelf. Shew that you not only poſſeſs abilities, but that you are patient in the exerciſe of them. And recollect that no people on the earth pay a higher price for the adminiſtration of juſtice than the Engliſh do, no people therefore are better entitled to have the adminiſtration of juſtice conducted with propriety; for of what benefit will the boaſted purity and equality of our laws be, if the channels of juſtice are foul. A hot tempered impetuous and negligent judge is a greater curſe to a country than a corrupt judge; and though haſty judgments may ſometimes ſhew a quickneſs of diſcernment, yet perhaps in nineteen out of twenty caſes, ſuch haſte may be productive of error, increaſe of expence, and ruin to the parties; and it is infinitely of greater importance to the public that the cauſes of parties ſhould be compleatly inveſtigated, than that the quickneſs of the judges ſhould be diſplayed in ſhewing how many cauſes they can get through at a ſitting.